Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

UNITED FARMERS PLANT FOOD, INC.,
d/b/a FARMERS AG CENTER,

Petitioner,

v.

LEBANON CHEMICAL CORP.,
d/b/a LEBANON SEABOARD CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a district court refuse to compel arbitration required under a contract based on its own determination of the merits of the dispute between the parties, notwithstanding the requirements of the Federal Arbitration Act?

PARTIES TO THE PROCEEDING

Petitioner

United Farmers Plant Food, Inc., d/b/a Farmers Ag Center, which has no parent companies or non-wholly owned subsidiaries

Respondent

Lebanon Chemical Corporation, d/b/a Lebanon Seaboard Corporation, which, to the knowledge of Petitioner, has no parent companies or non-wholly owned subsidiaries

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The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 179 F.3d 1095 (8th Cir. 1999). A copy of the opinion is included in Appendix A at 1a-11a. The unreported opinion of the District Court for the Western District of Missouri is included in Appendix B at 12a-18a. The District Court made entry of the final order on July 9, 1998, which is printed in Appendix C at 19a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on June 16, 1999. On June 29, 1999, Petitioner filed a Petition for Rehearing En Banc which the United States Court of Appeals denied on July 20, 1999 (App. D, 20a).[1] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

[1] Citations to "App." are to the Appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Arbitration Act

9 U.S.C. § 3

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

STATEMENT OF THE CASE

Petitioner United Farmers Plant Food, Inc. (herein "United") is in the business of buying fescue seed from growers, storing it, processing it and selling it to wholesalers. Respondent Lebanon Chemical Corp. (herein "Lebanon") is a wholesaler of such seeds, and buys seed for resale from United.

On March 5, 1997, buyer Lebanon entered into Contract M-2020 (App. E, 21a). Buyer Lebanon claimed that the contract only provided that it would purchase 1.25 million pounds of fescue seed from seller United, whereas seller United claimed that the contract provided for the sale of its entire remaining inventory as of April

30, 1997.[2] There was no dispute that 1.25 million pounds of fescue seed had been delivered to Lebanon and paid for. The dispute concerned whether any additional seed invoiced to Lebanon by United was covered by Contract M-2020.

On January 12, 1998, buyer Lebanon filed an action against seller United seeking an injunction and damages. The District Court had jurisdiction over the original action pursuant to 28 U.S.C. § 1332 because there was diversity between United and Lebanon. United filed an Amended Counterclaim on March 13, 1998 seeking, among other things, recovery under Contract M-2020 for approximately $1.7 million in unpaid invoices. United then filed a Motion to Compel Arbitration with the District Court. After a hearing on the Motion to Compel Arbitration, the District Court entered its order denying United any right to arbitrate under Contract M-2020 (App. B, 12a-18a). The District Court found that Contract M-2020 was unambiguous as to the amount of seed covered did not suggest that additional seed sales were contemplated under it. Based on that finding, the District Court determined that there was no dispute under contract M-2020 which required arbitration.

United filed a timely appeal with the Court of Appeals for the Eighth Circuit. On June 16, 1999, the Court of Appeals affirmed the District Court's judgment, and in so doing relied upon the District Court's finding that Contract M-2020 was unambiguous as to the amount

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[2] Based on the language in the contract relating to the "Balance of seed left to Farmers Ag Center as of April 30, 1997."

of seed it covered and did not apply to any additional seed as alleged by United (App. A, 7a-8a). United's request for en banc review was denied on July 20, 1999.

ARGUMENT FOR GRANTING WRIT

By refusing to compel arbitration, the District Court ruling undermines the intent and purpose of Section 3 of the Federal Arbitration Act (herein the "FAA") by assuming the mantel reserved for the arbitrator. If the District Court can determine the merits of disputes between parties to a contract which are subject to arbitration, then there is little room or need for the arbitration process.

The order of the District Court and the opinion of the Court of Appeals for the Eighth Circuit conflict in principle, and undermine this court's holdings in *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

This court has consistently expanded the reach of the Federal Arbitration Act to favor the rights of private parties to contract for a non-judicial resolution of their disputes. The holdings of the lower courts constitute a substantial retrenchment which exalts the jurisdiction of district courts over the rights of private parties to select their own forum for dispute resolution and are in direct conflict with the directive of Congress establishing a

public policy encouraging and sanctioning arbitration agreements.

ARGUMENT

The FAA clearly places the power to resolve the *merits* of a contractual dispute with an arbitrator and the District Court cannot frustrate an agreement for arbitration by ruling the merits of the dispute in determining arbitrability.

There was no dispute that United and Lebanon entered into Contract M-2020, nor that it provides for arbitration. That contract incorporated the rules of the American Seed Trade Association (herein the "ASTA"). ASTA Rule XVI, 1.A. states:

> With the exception of the differences mentioned in Rule XIV, paragraphs 6 and 7, all differences which cannot be amicably resolved, even if only one of the parties declares that there is a difference, arising from a contract started or concluded under these rules, shall first be decided by arbitration before it can be submitted to a court of law. (App. F, 24a)

Simply stated, the dispute between United and Lebanon was whether Contract M-2020 was limited by its terms to 1.25 million pounds of fescue seed or whether it was subject to an interpretation which included all seed in the inventory of United as of April 30, 1997.

This court has placed clear limitations upon the right of a lower court to delve into the merits of a dispute

between parties to a contract which is subject to arbitration. In *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967), the court stated:

> We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.

Likewise, in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649-650 (1986), this court stated:

> The third principal derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court **is not to rule on the potential merits** of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claims that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. (Emphasis added)

In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985), the court stated:

> By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts ***shall*** direct the parties to proceed to arbitrate on issues as to which an arbitration agreement has been signed.

The District Court and the Court of Appeals for the Eighth Circuit have engaged in an impermissible usurpation of the contractual right of United and Lebanon to

submit their dispute to arbitration. In so doing the District Court and the Court of Appeals have ignored the clear mandate of Section 3 of the FAA which states that "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration" it shall on application of a party stay the trial until arbitration has been completed.

In its opinion, the District Court stated:

> United would have the court construe notes 4, 5 and 6 of Contract M-2020 to include future sales of seed – which constitute the disputed seed in question. However, a plain reading of the notes of Contract M-2020 in no way suggests that additional seed sales are contemplated under Contract M-2020. Even if Contract M-2020 can be found to be ambiguous as United suggests, the court finds from the evidence presented at the hearing on June 29, 1998, that the parties did not intend for Contract M-2020 to be a standing contract for the sale of additional seed above the 1,250,000 pounds of seed that was bought and paid for under Contract M-2020. (App. B, 14a-15a).

That very language was adopted by the Court of Appeals (App. A, 7a-8a). By going beyond merely determining whether an interpretation of the contract is written the scope of the arbitration clause in the ASTA trade rules, the lower courts have completely ignored the case in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983) which states:

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor

> of arbitration, **whether the problem at hand is the construction of the contract language itself** or an allegation of waiver, delay, or a like defense to arbitrability. (Emphasis added)

The Court of Appeals incorrectly relied upon the holding in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) and *Houlihan v. Offerman & Co., Inc.*, 31 F.3d 692 (8th Cir. 1994), as neither of those cases support its conclusion that in deciding arbitrability the District Court had the right to delve into the merits of the dispute which was to be submitted to arbitration. In fact, the opinion of the Court of Appeals runs directly counter to the holding in *First Options*, which reiterated the strong presumption in favor of referring merit-related disputes to arbitration. See *First Options*, 514 U.S. at 944-945.

The District Court should have made a determination as to whether the issue in dispute (the interpretation of Contract M-2020) fell within the scope of the arbitration clause agreed to by the parties. In this instance, the District Court bypassed its appropriate gate keeping responsibilities and proceeded further to decide the merits of the dispute. The District Court stated in effect: "You cannot arbitrate because I do not think you can win!" In fact, it appears that the lower courts in this case have added an important new requirement to the arbitration of disputes relating to contract interpretation – not only must there be a contract for arbitration of the dispute in issue, but the proponent for arbitration must satisfy the District Court of its right to prevail on its claimed interpretation of the contract. United respectfully

submits that such a requirement reduces the FAA to a hollow shell.

CONCLUSION

The usurpation of power by the District Court and the Court of Appeals below highlight the fragility of a private party's right to contract for arbitration. They place the right to interpret contracts which are clearly subject to arbitration within the bosom of the District Court, a marked departure from the Congressional mandate set out in the FAA and a retrenchment from the long line of cases in this court which have expanded and confirmed the right of private individuals to contract for an arbitration of disputes. The right to contract for dispute resolution by arbitration is an important federal question and this court should not turn a blind eye toward a blatant attempt to strip United of its right to arbitration.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals Opinion, 4/19/99

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 98-1426, 98-3187, 98-3340

Lebanon Chemical Corporation, doing business as Lebanon Seaboard Corporation, Appellee/Cross-Appellant, v. United Farmers Plant Food, Inc., doing business as Farmers AG Center, Inc., Appellant/Cross-Appellee.	* * * * * * * * * * * * * * *	Appeals from the United States District Court for the Western District of Missouri.

Submitted: April 19, 1999

Filed: June 16, 1999

Before BEAM and HANSEN, Circuit Judges, and KOPF,[1] District Judge.

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[1] The Honorable Richard G. Kopf, United States District Court Judge for the District of Nebraska, sitting by designation.

BEAM, Circuit Judge.

A seed processor refused to release a customer's seed until a dispute over invoices unrelated to the seed in question was resolved. The district court[2] issued a preliminary injunction compelling the processor to release the seed, and granted in part and denied in part a motion by the seed processor to compel arbitration over the disputed invoices. We affirm.

I. BACKGROUND

United Farmers Plant Food, Inc., (United) buys seed from growers, then stores, processes, and sells that seed to seed wholesalers. Lebanon Chemical Corporation (Lebanon) is such a wholesaler. It purchased Kentucky 31 tall fescue grass seed (seed, or Kentucky 31) from United. Normally, the parties would enter into a large contract for a specific amount of seed. United would buy the seed, then clean, sort, blend, bag, and label the seed[3] and ship it to Lebanon or directly to Lebanon's customer as United received an order.

Both United and Lebanon belong to the American Seed Trade Association (ASTA). The ASTA rules provide for arbitration of any disputes arising from contracts between members before resort to a court of law to settle

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[2] The Honorable Russell G. Clark, United States District Court Judge for the Western District of Missouri.

[3] Different customers have different packaging or purity requirements.

the argument. All arbitrations are submitted to the American Arbitration Association (AAA) and determined under AAA Commercial Arbitration Rules.

The 1996 harvest of Kentucky 31 was poor, thus seed prices in spring 1997 were much higher than normal. As a result, Lebanon wanted to purchase just enough seed to cover its obligations and have no carryover of the more expensive seed past the spring 1997 selling season. On March 5, 1997, Lebanon entered into contract M-2020 with United for 1.25 million pounds of seed for delivery in March and April 1997. It is undisputed that these 1.25 million pounds were delivered to and paid for in full by Lebanon.

Lebanon's customers continued to demand more seed after all of the seed covered by contract M-2020 was shipped or committed to orders received. Rather than enter into another large contract, Lebanon directed United to fill the additional orders from existing Lebanon inventory if possible, then to go to the market on an as-needed basis to purchase, process, and ship the necessary seed to Lebanon's customers. Lebanon would then pay on invoice with a bill of lading indicating shipment to the customer.

Beginning in May 1997, Lebanon received some invoices from United without bills of lading. There are a total of twenty-nine of these disputed invoices. United and Lebanon communicated back and forth the remainder of 1997 in an effort to resolve these disputed invoices. At one point, Lebanon made a partial payment on some of the invoices.

Meanwhile, K-Mart stores, one of Lebanon's customers in 1997, canceled its remaining orders in May and returned approximately 1.25 million pounds of seed to United, who stored the seed for Lebanon. At the end of the 1997 season, the K-Mart seed, together with seed carried over from the previous season, totaled approximately 2.377 million pounds. Additionally, in July 1997, Lebanon entered into another contract (M-2021) with United for two million pounds of seed for delivery in spring 1998. Lebanon paid in full for contract M-2021. Thus at the end of 1997, these two quantities of seed (the contract M-2021 seed and the K-Mart/carry-over seed) comprised approximately 4.3 million pounds of Kentucky 31 held by United for Lebanon. There is no dispute that Lebanon paid in full for this seed.

In January 1998, United refused to release any of the 4.3 million pounds of seed to fill current orders from Lebanon's customers, until Lebanon paid the disputed invoices, essentially holding the paid-for seed hostage. Lebanon then filed suit in district court seeking a preliminary injunction to compel United to release the paid-for seed. United, in return, then filed a demand for arbitration with the AAA, and a motion with the district court to compel arbitration. On January 30, 1998, finding that the disputed invoices did not touch or concern the paid-for seed, the district court issued a preliminary injunction ordering United to turn over the 4.3 million pounds of seed "within ten days of request by plaintiff in such units as are commercially reasonable and practicable and in such condition as is customary or as agreed upon between the parties previously." The court also denied

United's motion to compel arbitration. United appeals this order.

United later filed a counterclaim and second motion to compel arbitration. In July 1998, after a two-day hearing, the court ordered arbitration only for those invoices on which Lebanon had made partial payment, but denied the motion with regard to the remainder of the invoices. United appeals the district court's denial of arbitration on the remaining invoices and Lebanon cross-appeals the court's order compelling arbitration concerning the partially paid invoices. The arbitration appeals from the July order were consolidated with United's appeal of the January order granting the preliminary injunction.

II. DISCUSSION

A. Preliminary Injunction

Initially we note that we have jurisdiction under 28 U.S.C. § 1292(a)(1) to consider this interlocutory appeal of an order granting an injunction.

United asserts that the district court abused its discretion by issuing the preliminary injunction compelling United to release 4.3 million pounds of seed to Lebanon. United relies on *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey,* 726 F.2d 1286 (8th Cir. 1984), for the proposition that once an effective arbitration agreement is found to exist, any injunctive relief would be an improper intrusion into the arbitration process and the independence of the arbitrator. *See id.* at 1292. We need not explore the scope of *Hovey,* nor decide the propriety of the district court's preliminary injunction because the issue is moot.

"Through the passage of time and the occurrence of irrevocable events, disputes may disappear so that federal courts no longer can grant effective relief." *McFarlin v. Newport Special Sch. Dist.*, 980 F.2d 1208, 1210 (8th Cir. 1992). When this happens, the issue is moot and a federal court has no power to decide the issue. *See Beck v. Missouri State High School Activities Ass'n*, 18 F.3d 604, 605 (8th Cir. 1994). The seed, which Lebanon had already paid for, has long since been delivered to Lebanon, shipped to Lebanon's customers for resale, and is presumably now growing in various fields and yards across the country. There is nothing that this court could now do to remedy the effects of the injunction even if it were improvidently granted.

United contends that even if the question of the injunction is moot, the appeal is not moot because it may be able to recover on the injunction bond posted by Lebanon if we should determine that the district court erred in granting the injunction. Any right to recover under the injunction bond is not now before this court as the district court retained jurisdiction pending final resolution of all issues. *See Olin Water Servs. v. Midland Research Labs., Inc.*, 774 F.2d 303, 307 (8th Cir. 1985). Any claim by United that it should recover on the injunction bond must first be tried before the district court. *See id.* at 308.

B. Orders Denying and Granting Arbitration

United first appeals the district court's January order denying United's motion to compel arbitration regarding

the 4.3 million pounds of paid-for seed. For the reasons stated above, that issue is moot.[4]

We now reach the substance of the dispute. The district court conducted a two-day hearing on the arbitrability of the twenty-nine disputed invoices. The court then ordered the parties to proceed to arbitration on twelve invoices on which Lebanon had made partial payment, and denied arbitration for the remaining seventeen invoices. United appeals that portion of the order denying arbitration, and Lebanon cross-appeals that portion ordering arbitration.

We have jurisdiction under 9 U.S.C. § 16(a)(1)(B) for an appeal of an interlocutory order denying arbitration. We review de novo the district court's decision to grant or deny arbitration. *See Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 344 (8th Cir. 1990). The factual findings of the district court are reviewed for clear error. *See id.* Arbitration is a creature of contract. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Without a clear and unmistakable delegation of the question of arbitrability to an arbitrator, the arbitrability of a dispute must be decided by the courts. *See id.* at 944. The relevant language from Rule XVI(1) of the ASTA Rules states: "[A]ll differences which cannot be amicably resolved . . . arising from a contract started or concluded under these Rules, shall first be decided by arbitration before it can be

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[4] United claimed that the term "spring 1998" in contract M-2021 allowed it to deliver the seed any time it chose between January 1, 1998, and June 1, 1998. The seed has been shipped and June 1, 1998, is long past. Any determination of the issue would be merely academic.

submitted to a court of law." The general phrase "any controversy" in an arbitration agreement does not satisfy the express delegation required by *Kaplan*. *See McLaughlin Gormley King Co. v. Terminix Int'l Co., L.P.*, 105 F.3d 1192, 1194 (8th Cir. 1997). We find that the phrase "all differences" in the arbitration clause at issue here is similarly too general to amount to an express delegation of the issue of arbitrability. Thus it was for the district court to determine arbitrability of this dispute.

Under the language of the arbitration agreement, the parties have a right to arbitration only as to disputes "arising from a contract started or concluded under [the ASTA rules]." The contracts between United and Lebanon contain the language: "This memo is subject to the trade rules of the American Seed Trade Association," thus effectively incorporating the ASTA arbitration provision into contracts between Lebanon and United. The district court properly concluded that there must first be a contract between the parties that is in dispute before any right to arbitration can arise.[5]

To prove a contract, United offered sales memoranda in the form of contracts that it sent to Lebanon, and accompanying invoices. None of these are signed by Lebanon. United first argues that the disputed invoices and memoranda are addenda, or supplemental contracts to contract M-2020, and thus the arbitration clause in M-2020 gives it the right to present all the disputed invoices to an arbitrator. In the alternative, United argues

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[5] The district court found contracts existed with regard to the partially paid invoices because, by making payment, Lebanon had acknowledged an agreement.

that each memoranda is a separate, valid, and enforceable contract, each providing for arbitration.

Contract M-2020 was for 1.25 million pounds of Kentucky 31. There is no dispute that all of this seed was shipped and paid for. The district court found that contract M-2020 was unambiguous as to the amount of seed it covered and that the contract "in no way suggests that *additional* seed sales are contemplated under contract M-2020." United cannot create a relationship between contract M-2020 and the disputed invoices out of whole cloth simply by claiming that a relationship exists.[6] Thus the district court denied arbitration based on the arbitration agreement contained in contract M-2020.

United argues that once the court found that M-2020 was a valid contract with an arbitration clause, its inquiry should have ended with all issues being sent to arbitration. We disagree. The arbitration agreement provides relief for disputes arising from a contract started under the ASTA rules. Finding a valid contract under the ASTA rules is only the first step of the district court's inquiry. The court must also make sure that the dispute *arises from that contract.* When a court determines arbitrability of a dispute, it looks to more than the mere existence of a valid arbitration agreement. It also measures the scope of that agreement and determines whether the present dispute is included within its reach. *See First Options,* 514 U.S. at 944-45; *Houlihan v. Offerman & Co., Inc.,* 31 F.3d 692, 694-95 (8th Cir. 1994).

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[6] None of the disputed invoices reference contract M-2020, and in fact refer to other "contract," numbers, and those "contracts" contained terms different from those in M-2020.

United asserts that under *Fleet Tire Service of North Little Rock v. Oliver Rubber Co.*, 118 F.3d 619 (8th Cir. 1997), the arbitration clause at issue is broad rather than narrow, and as a result, the question of whether the claim relates to the contract with the arbitration clause is for the arbitrator to decide. United misconstrues the holding of *Fleet Tire*. In *Fleet Tire*, this court followed *Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59 (2d Cir. 1983), in recognizing a distinction between "narrow" and "broad" arbitration agreements. *See Fleet Tire*, 118 F.3d at 621. A court deciding arbitrability under a broad agreement leaves for the arbitrator the issue of whether the controversy in question relates to the agreement containing the arbitration clause, i.e., the scope of the clause. *See id.* However, there are significant differences between the arbitration clause in *Fleet Tire* and that contained in the ASTA Rules. The agreement in *Fleet Tire* read in pertinent part: "Any controversy or claim arising out of or relating to this Agreement . . . shall be settled by arbitration. . . . The arbitration provided for . . . shall be the exclusive remedy for any dispute between [the parties], as a substitute for any and all legal remedies and proceedings that would otherwise be available to them." *Id.* at 620. Contrary to United's argument, it is not the phrase "any controversy or claim" which places the *Fleet Tire* clause in the broad category. The *Fleet Tire* court expressly relied on the additional and more general phrase "relating to" to find that the arbitration clause was broad. *See id.* at 621. The arbitration agreement in this case has none of the mentioned distinguishing language and is therefore not a broad arbitration clause. Thus we find the district court properly

determined whether the disputed invoices arose from contract M-2020.

Since United cannot compel arbitration of the disputed invoices on the basis of contract M-2020, it can do so only if the individual invoices and sales memoranda amount to valid contracts between the parties. From the evidence presented, the district court found that the parties changed their method of entering into a contract because of the volatility of the seed market. The new method provided for a series of smaller contracts. Lebanon would pay United for seed that United procured in the marketplace, processed and shipped to Lebanon's customer to fill an order. The parties did not intend to consummate a contract until United provided Lebanon with a bill of lading showing that seed had been delivered to Lebanon's customer. The disputed invoices were for seed that United purchased, processed, and *placed in inventory for Lebanon*. The disputed invoices did not have bills of lading showing shipment to a customer, and the seed was in fact not shipped to Lebanon's customers. Thus, the unpaid invoices and accompanying memoranda are not contracts between the parties. Without a contract from which the dispute arises, there can be no applicable arbitration clause.

United asserts that the invoices and sales memoranda it sent to Lebanon are sufficient to create valid contracts under Missouri law. United relies on that portion of the Uniform Commercial Code that allows a confirmation sent from one merchant to another to satisfy the writing

requirement of the statute of frauds.[7] United argues that, by operation of the statute, Lebanon is bound by the "contracts" because it did not object to them within ten days. This argument must fail. The only impact of the statute is to eliminate the statute of frauds as an affirmative defense, a defense Lebanon did not raise. Without more, a binding contract cannot be created by simply sending documents to a party who then does not respond. The burden remains on United to establish the existence of the underlying contract evidenced by the writing, and the terms of that agreement. *See* Mo.Rev.Stat. § 400.2-201, comment 3. We agree with the district court that United has not established the existence of a contract from which the unpaid disputed invoices arise.

Lebanon cross-appeals that portion of the district court's order directing arbitration to proceed on the partially-paid invoices. Lebanon's sole argument is that United's demand for arbitration over the disputed invoices was untimely. We have no jurisdiction to entertain this appeal. This court has previously recognized the strong pro-arbitration tilt of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16. *See Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 96 (8th Cir. 1994). Although interlocutory orders denying arbitration are appealable,

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[7] Mo.Rev.Stat. § 400.2-201(2) provides:

> Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the [statute of frauds requirement of a writing] against such party unless written notice of objection to its contents is given within ten days after it is received.

interlocutory orders directing arbitration to proceed are not. *See* 9 U.S.C. § 16(a)(1), (b)(2); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 135-36 (4th Cir. 1997). An order granting arbitration may be appealed if it is a final order or certified by the district court under 28 U.S.C. § 1292(b). The issue of arbitrability in this case is not independent, but rather embedded in the larger action concerning the final disposition of the preliminary injunction and United's remaining counterclaims – issues yet to be resolved by the district court. In *Gammaro* we adopted a bright line rule "that an embedded proceeding cannot give rise to a final decision subject to section 16(a)(3) review." *Gammaro*, 15 F.3d at 96. Lebanon's appeal is neither certified by the district court, nor final, thus the order is interlocutory and not appealable for that portion granting arbitration. *See id.; Pisgah Contractors*, 117 F.3d at 135-36; *McDermott Int'l, Inc. v. Underwriters at Lloyds*, 981 F.2d 744, 748 (5th Cir. 1993).

III. CONCLUSION

For the above reasons, United's appeal of the district court's January order is dismissed as moot, Lebanon's appeal is dismissed for lack of jurisdiction, and the orders of the district court are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

District Court Order, 7/9/98

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

LEBANON CHEMICAL CORPORATION d/b/a LEBANON SEABOARD CORPORATION, a Pennsylvania corporation,	)	
Plaintiff,	)	No. 98-3013-CV-S-RGC
vs.	)	
UNITED FARMERS PLANT FOOD, INC. d/b/a FARMERS AG CENTER, a Missouri corporation,	)	
Defendant.	)	

ORDER

(Filed Jul. 9, 1998)

This matter comes before the Court on defendant's Motion to Compel Arbitration and plaintiff's Motion for Contempt. On June 29, 1998, this Court held an evidentiary hearing in consideration of both parties' Motions. Pursuant to the findings of fact stated below, the Court will grant in part and deny in part defendant's Motion to Compel Arbitration and will grant plaintiff's Motion for Contempt.

A brief statement of the case to date is necessary for the proper consideration of both Motions. On January 12, 1998, plaintiff Lebanon Chemical Corporation (hereinafter as "Lebanon") filed with this court a Complaint seeking, among other relief, specific performance of a contract

that Lebanon had entered into with defendant United Farmers Plant Food (hereinafter as "United"). Lebanon maintained that United was refusing to turn over grass seed which Lebanon had already paid for while United maintained that the seed was part of a larger contract for which Lebanon had failed to provide full payment. On January 30, 1998, the Court ordered specific performance on that portion of the seed which had already been paid for by Lebanon. United is now before this Court seeking to compel arbitration over the remaining disputed seed. Lebanon is also before the Court seeking sanctions against United for United's alleged failure to timely comply with this Court's Order of specific performance entered on January 30, 1998, as well as subsequent orders. The Court will consider each parties' Motion in turn.

MOTION TO COMPEL ARBITRATION

In absence of an express delegation of the question of arbitrability to an arbitrator, arbitrability must be decided by the courts. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). The controlling arbitration agreement before the Court does not expressly delegate the issue of arbitrability to the arbitrator and, therefore, the question of whether the dispute in question should be sent to arbitration is a question for the Court to resolve.

As this Court had stated in its Order of January 30, 1998, the Court does not read the controlling arbitration agreement in this case to require arbitration in absence of a contract. The arbitration agreement specifically provides for arbitration of disagreements "arising from a

contract." In addition, under the plain language of the Federal Arbitration Act, the existence of an underlying contract is necessary before an arbitration agreement must be recognized by this Court. 9 U.S.C. § 2. As a result, the Court must determine as a threshold issue whether a contract exists before sending a dispute to arbitration.

Principally, United seeks to have this Court compel arbitration of the disagreement over, by this Court's calculation, 1,395,000 pounds of seed for which payment has not been made by Lebanon and 1,485,000 pounds of seed for which only partial payment has been made by Lebanon. United argues that all of this disputed seed was part of contract M-2020. Lebanon argues that contract M-2020 is a contract unto itself not touching any of the disputed seed. The Court heard argument and evidence concerning whether the disputed seed was indeed part of a contract which would compel arbitration under the rules set forth in the arbitration agreement.

United argued and presented evidence to the Court that contract M-2020 encompassed all of this disputed seed and that, if not, the disputed seed was under various individual contracts, all of which contained a clause subjecting disputes to the Trade Rules of the American Seed Trade Association which require arbitration of disputed contracts. Lebanon argued and presented evidence to the Court that contract M-2020 was a contract standing by itself and that no contract existed regarding the disputed seed otherwise.

As stated in this Court's previous orders, Missouri contract law is controlling in this case. The Parole

Evidence Rule prevents the Court from looking outside of a contract where a contract is a complete, integrated writing which is not ambiguous. *Jake C. Byers, Inc. v. J.B.C. Investments,* 834 S.W.2d 806, 812 (Mo. Ct. App. 1992). In looking at contract M-2020, the Court cannot escape the fact that, as to the quantity in question, the contract is not ambiguous. M-2020 calls for 1,250,000 pounds of seed to be sold between the parties. This seed was delivered and paid for and the contract was thereby presumably concluded.

United would have the Court construe notes 4, 5 and 6 of contract M-2020 to include future sales of seed – which constitute the disputed seed in question. However, a plain reading of the notes of contract M-2020 in no way suggests that *additional* seed sales are contemplated under contract M-2020. Even if contract M-2020 could be found to be ambiguous as United suggests, the Court finds from the evidence presented at the hearing on June 29, 1998, that the parties did not intend for contract M-2020 to be a standing contract for the sale of additional seed above the 1,250,000 pounds of seed that was bought and paid for under contract M-2020.

United also argues that, because United purchased seed and then sent separate invoices to Lebanon covering that seed, contracts have been created and the dispute is therefore arbitable because the alleged corresponding contracts to those invoices contained a clause subjecting disputes to the Trade Rules of the American Seed Trade Association which require arbitration of disputed contracts. However, purchases by a seller and invoicing of a buyer is generally not enough to evidence a contract. Some kind of agreement of the parties is necessary to

prove the existence of a contract. *See* Mo. Rev. Stat. § 400.2-204 (1998). United argued and presented evidence that the parties had a prior course of business which established contracts based upon the invoices in question. However, the Court finds that, while the parties had previously done business on a written contract basis as exemplified by contract M-2020, the parties changed their method of making a contract because of a volatility of the seed market.

From the evidence presented at the hearing, the Court finds that the parties did not intend to consummate a contract until a bill of lading had been provided to Lebanon which showed to Lebanon that performance had been completed by United's delivery of seed to a customer of Lebanon. A bill of lading for inventory to be held at United did not necessarily constitute a completed contract until both parties agreed to the existence of that contract. With respect to the unpaid disputed seed that was held in inventory at United, the Court finds, therefore, that the parties did not intend to create contracts. Thus, no contracts were created for any of the unpaid disputed seed. There really is not a dispute as to whether contracts exist for those invoices for which Lebanon has provided partial payment. In making a partial payment on those invoices, Lebanon evidenced its agreement to those contracts. In that regard, it is clear that contracts do exist between the parties for those partially paid invoices.

Having determined the existence and non-existence of contracts with respect to the disputed seed in question, the Court will now discuss whether United is entitled to arbitration. In absence of contracts controlling the unpaid disputed seed, the Court will not compel arbitration. In

addition, the Court will not compel arbitration on contracts for which seed has been delivered and paid for because no real disagreement exists, for example: contract M-2020. However, as the Court stated above, a contract obviously was acknowledged and does exist with respect to those invoices for which partial payment was made, and the Court will compel arbitration with respect to those partially paid contracts for only that amount of seed specifically stated on those invoices.

One final issues [sic] remains: whether United properly invoked arbitration on the partially paid seed. Lebanon argues that the initial notice of arbitration was not made in a timely manner because the notice was not specific with respect to the individual contracts involved in the disagreement. The rules in the arbitration agreement mandate that a party need only reference an amount involved in the dispute and not a specific contract to invoke arbitration. The Court finds that United's initial arbitration demand did include an amount which covered the partially paid invoices. Accordingly, the Court will deny United's Motion to Compel with respect to all seed that may be in dispute except that seed for which invoices exist only partially paid for by Lebanon. To avoid any confusion, the Court is referring only to those partially paid invoices so-labeled in United's exhibit FF as introduced at the hearing on June 29, 1998.

MOTION FOR CONTEMPT

Also before the Court is Lebanon's Motion for Contempt. Lebanon alleges that United failed to timely comply with this Court's Order of January 30, 1998, which ordered United to turn over to Lebanon seed for which Lebanon had paid for but which was being withheld by United. The Court has the statutory authority to levy fines, at its discretion, for disobedience to its lawful orders. 18 U.S.C. § 401. The Court may order that such fines be paid to the movant to compensate a movant for damage that the offending party has caused by its contempt. *Coleman v. Espy*, 986 F.2d 1184, 1190 (8th Cir. 1993), *cert. denied*, 510 U.S. 913, 114 S.Ct. 301, 126 L.Ed.2d 249.

After receiving evidence as presented at the hearing before the Court on June 29, 1998, the Court finds by clear and convincing evidence that United intentionally failed to make the seed *available for delivery* within the time period specified in this Court's Order of March 30, 1998. In addition, the Court finds by clear and convincing evidence that United intentionally failed to comply with this Court's Order of January 30, 1998, wherein the Court ordered delivery of the seed in question in a commercially reasonable and practicable fashion. Specifically, the Court finds that United failed to timely deliver the seed in question and that the seed was not necessarily delivered in the manner customarily required of the seed industry. Finally, the Court does find that Lebanon suffered financial damage in excess of $10,000 as a result of United's failure to comply with this Court's orders. Accordingly, the Court will order that United pay a fine of $10,000 for failure to comply with this Court's Orders and that such fine is payable immediately to Lebanon.

Accordingly, it is

ORDERED that defendant United Farmers Plant Food's Motion to Compel Arbitration is granted in part and denied in part as set forth in this Order; it is further

ORDERED that plaintiff Lebanon Chemical Corporation's Motion for Contempt is granted in that defendant United Farmers Plant Food shall pay plaintiff Lebanon Chemical Corporation $10,000 as fine for being in contempt of this Court's Orders.

/s/ Russell G. Clark
RUSSELL G. CLARK,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: July 9, 1998

APPENDIX C

District Court Judgment in a Civil Case, 9/9/98

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

LEBANON CHEMICAL CORP.,	)	
vs.	)	**Case No.**
	)	**98-3013-CV-S-RGC**
UNITED FARMERS PLANT FOOD, INC.,	)	
	)	

JUDGMENT IN A CIVIL CASE

(Filed Jul. 9, 1998)

❒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

■ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant United Farmers Plant Food's Motion to Compel Arbitration is granted in part and denied in part as set forth in this Order; and it is further

ORDERED that plaintiff Lebanon Chemical Corporation's Motion for Contempt is granted in that defendant United Farmers Plant Food shall pay plaintiff Lebanon Chemical Corporation $10,000 as a fine for being in contempt of this Court's Orders.

July 9, 1998

R.F. CONNOR, CLERK

Entered on: July 9, 1998

/s/ Glenda Elayer
(By) Deputy Clerk

APPENDIX D

United States Court of Appeals Order, 7/20/99

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 98-1426/3187WMS

Lebanon Chemical Corporation, doing business as Lebanon Seaboard Corporation, a Pennsylvania Corporation,	*	
Plaintiff-Appellee,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
v.	*	
United Farmers Plant Food, Inc., doing business as Farmers AG Center, Inc.	*	
Defendant-Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

July 20, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

Contract M-2020, 3/5/97

FARMERS
Ag Center
[Logo]
SEED & FERTILIZER

East Business 60 • P.O. Box 667 • Mountain Grove, Missouri 65711

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(417)926-5001

Selling Bulk Fertilizer
• Processors of Kentucky 31 Tall Fescue

DATE: 3-5-97 **CONTRACT NO: M-2020**

SELLER: Farmers Ag Center
P.O. BOX 667
Mtn. Grove, MO 65711
(417)-926-5001

BUYER: Lebanon Seaboard Corp.
P.O. BOX 117
Bristol, IL 60512
(800)323-1862

ITEM:	KENTUCKY 31 TALL FESCUE
QUANTITY:	1,250,000 #
QUALITY:	98/85, LEGAL STATE OF DESTINATION, ONION & JOHNSON GRASS FREE
PACKED:	NET 50 LB. BAGS
PRICE:	$113.00 CWT FOR 98% PURITY $110.00 CWT FOR 95% PURITY
F.O.B.	MTN. GROVE, MO
SHIPMENT:	MARCH-APRIL, AUGUST SEPT (SEE REMARKS)
VIA:	BUYER TO ARRANGE
TERMS:	NET 30 DAYS FROM INVOICE, ANY BALANCE NOT USED BY APRIL 30TH, 1997 TO BE BILLED OUT MAY 1, 1997 (SEE REMARKS)

REMARKS:

1. SELLER'S PRICING AS FOLLOWS: 98% PURITY $1.13 PER POUND; 97%-95% PURITY $1.10 PER POUND; K-MART QUALITY $1.07 PER POUND

2. THERE WILL BE A $2.00 UNCHARGE FOR ANYTHING PACKAGED IN 25# BAGS IF SELLER PURCHASES BAGS.

3. PALLETIZATION FEES AS FOLLOWS: $6.50 PER PALLET OR $.010833 PER POUND FOR 50# BAGS AND $.013 PER POUND FOR 25# BAGS.

4. THE BALANCE OF SEED LEFT AT FARMERS AG CENTER AS OF APRIL 30TH, 1997: BAGGED SEED AND/OR SEED OF NON SHIPPABLE FORM.

5. THE BALANCE OF SEED LEFT AT FARMERS AG CENTER AS OF APRIL 30TH, 1997 WILL BE BILLED OUT AS FOLLOWS: BAGGED SEED FROM OUTSIDE VENDORS: FARMERS AG CENTER'S COST PLUS DIFFERENCE IN COST AND THIS CONTRACT ACCORDING TO QUALITY OF THE SEED. NON-SHIPPABLE SEED TO BE BILLED OUT AT $.80 PER POUND – WITH THE DIFFERENCE IN $.80 AND THIS CONTRACT BEING DUE AUGUST 1, 1997.

6. FULFILLMENT OF THIS CONTRACT IS CONTINGENT UPON AVAILABILITY OF SEED POUNDS, GERM AND QUALITY, RIOTS, STRIKES, FLOODS, DELAY OF CARRIER, ACTIONS OF GOVERNMENT AUTHORITIES AND/OR OTHER CAUSES BEYOND SELLER'S CONTROL.

THIS MEMO IS SUBJECT TO THE TRADE RULES OF THE AMERICAN SEED TRADE ASSOCIATION. IF IT IS NOT IN FULL ACCORDANCE WITH YOUR

UNDERSTANDING, PLEASE ADVISE IMMEDIATELY. FAILURE TO DO SO IS UNDERSTOOD AS ACCEPTANCE.

PLEASE SIGN AND
RETURN DUPLICATE COPY

FARMERS AG CENTER

APPENDIX F

American Seed Trade Association Trade Rules, 10/1/91

TRADE RULES AND USAGES OF THE *AMERICAN SEED TRADE ASSOCIATION* AND THE *CANADIAN SEED TRADE ASSOCIATION*

For Seed For Planting Purposes / "NORAMSEED Trade Rules & Usages"

EFFECTIVE OCTOBER 1, 1991
These rules previously adopted by Southern Seedsmen's Association, March 1, 1978

RULE I

APPLICATION OF THE RULES

1. These Rules shall govern transactions in North America for seeds for planting purposes for members of ASTA and CSTA.

2. However, these Rules may also govern transactions of ASTA and CSTA members with non-members, as well as those of North American firms engaged in the seed industry which are not members of ASTA or CSTA, if so agreed between the parties.

3. Condition stipulated in contract which constitute an exception to the NORAMSEED Rules, shall automatically supersede the corresponding parts of these Rules.

4. For transactions within the United States, the UNIFORM COMMERCIAL CODE, in effect at the date of a contract, shall complement the NORAMSEED Rules.

RULE II

DEFINITIONS OF TIME ELEMENTS AND COMMUNICATIONS

1. When the word "hour" is used, hours on Saturdays, Sundays, and statutory holidays are excluded.

2. When the word "day" is used, Saturdays, Sundays, and statutory holidays are included.

3. When the words "working day" are used, Saturdays, Sundays, and statutory holiday are excluded.

4. "Telecommunications" means all kinds of facsimile, telecopies, teletypes, and telegrams.

5. Communications which arrive on a Saturday, a Sunday or a statutory holiday shall be regarded as arriving on the first working day thereafter.

6. When statutory holidays in Canada and in the United States do not fall on the same day, the holidays of the party concerned shall be considered valid.

RULE III

COMPLETION AND CONDITIONS OF CONTRACTS

1. a. Offers/bids by letter shall be considered non-binding.

   b. Offers/bids by telecommunications shall be considered firm for reply by telecommunication within 24 hours after the hour of receipt.

2. If a contract is concluded, the Buyer and the Seller shall, within three working days, unless justified delay can be established, mail to each other a confirmation of the said contract. If neither of the contracting parties sends a written confirmation, the contract shall be maintained on the basis of the verbal agreement or telecommunication or letter exchange.

3. A contract established by a broker resulting from an order or an acceptance shall be binding on all parties.

4. A description of the conditions shall be given in the offer/bid/contract/confirmation. Such descriptions shall include:

   a. Date of transaction;

   b. Quantity;

   c. Kind and variety;

   d. Description of quality (See Rule V);

   e. Price per unit and freight basis;

   f. Description of packaging (See Rule IV);

   g. Time of shipment;

   h. Terms of payment;

   i. Any terms or provisions which are not included in or which are contrary to these Rules.

5. Any misprint, error or omission in a confirmation or contract by a Seller, a Buyer or a Broker shall be corrected within 24 hours by telecommunication.

Transactions with firms outside the USA and Canada should be concluded under the corresponding rules of the Federation Internationalede Commerce Dees Semences (FIS). It is advisable to apply FIS Rules to transactions for import or export purposes between North American firms, because NORAMSEED Rules were conceived for trades within North America, while FIS Rules were conceived for international firms.

RULE IV

QUANTITY AND PACKAGING

1. The contract shall state the total quantity transacted by weight or number of seeds, as applicable (such as: 1 truckload of approx. 40,000 lbs., 200 bags or 80,000 kernels each, 50 cans containing 500 seeds each).

2. The contract shall state the contents by weight or number of seeds, as applicable, for all units of packaging forming one lot. It shall state the type of packaging, such as jute, paper or plastic bags, boxes, cans, bulk, etc.

3. The contract shall express whether the costs of packaging are included in or excluded from the contract price. If excluded, the costs of packaging shall be indicated in the contract.

4. a. In case of a sale by weight, the contract shall state whether gross or net weights apply.

   b. If necessary, the following conversions shall apply.

   50 kilos = 110.25 lbs.
   100 kilos = 220.50 lbs.
   1000 kilos = 2205 lbs. (one metric ton)
   100 lbs. = 45.36 kilos

5. The use of the words "about" or "approximately" shall permit the Seller to deliver, at the contractual conditions, 5% more or less than the contract calls for.

6. If the quantity lies between two figures, delivery shall take place within these stated limits. In the event of non-delivery, the average between the two figures shall serve as the basis of a settlement.

7. The quantity of a lot shall not exceed the one determined by the U.S. Federal and Canada Seeds Acts or by any other applicable official restrictions.

RULE V

QUALITY DESCRIPTIONS

1. A description of the quality shall be given – where applicable – as to the purity, germination, weed content, crop year and any other essential points pertaining to the quality of the seed.

2. The seed shall be sound, sufficiently dry, without bad odor, unadulterated and marketable. Seed treatments, including fumigation, and/or artificial staining shall be specifically agreed upon.

3. Each lot and the contents of each of its packages shall be uniform.

4. Special terms pertaining to quality are described as follows:

   a. "Representative sample" shall mean that such a sample shall be identical to the lot from which it is drawn.

   b. "Type sample" shall mean that such a sample shall be considered as the basis for comparison as to the essential characteristics of a seed lot, such as purity, size of seed, color, cleanliness and approximate contents of other seeds, weeds and foreign matter.

   c. "Clear Tag" for any named state or states shall mean that a purity analysis and noxious weed seed examination of a representative sample by a competent analyst, as prescribed in Rule V.4.h., disclosed no weeds which must otherwise be stated on the label to comply with the seed laws of the named state or states in effect at the date of contract.

   d. "Tagged to comply" or "legal for . . . " shall mean that the purity, germination, weed and seed contents, as well as any other specifications, shall comply with

the minimum quality standards of the seed laws of the named state or states in effect at the site of the contract.

e. "Free of" means that no named weeds or other named seeds shall be present in a sample of the minimum weight prescribed for seed examination in the seed testing rules of the Association of Official Seed Analysts of North America in effect on the date of the contract.

f. "Canadian Grade" shall be defined by the corresponding regulations and quality standards of the Canada Seeds Act in effect at the date of the contract.

g. "Eastern States" comprise the following states: Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Virginia, Vermont, West Virginia.

h. All test shall be made by competent analysts in the manner prescribed in the rules and regulations of the Association of Official Seed Analysts in effect of the date of the contract.

5. Terms pertaining to tolerances are described as follows:

a. Terms such as "minimum," "maximum," "or better," "less than," "not to exceed," et cetera, mean that no tolerances shall apply.

b. The Seller shall not apply tolerances at time of shipment.

c. Tolerances as defined in the U.S. Federal Seed Act or under the Canadian Seeds Act, in effect at date of the contract, shall apply based on tests made from samples of the seed lot drawn at destination.

d. The Seller shall lose the benefits of permitted tolerances if these are exceeded, and it shall give the Buyer the right to refuse the seed.

RULE VI

QUALITY DEFICIENCIES

1. Claims concerning the quality, other than for genetic purity, shall be telecommunicated by the Buyer to the Seller within three working days of learning of the discrepancy, but not later than within 45 days from the date of delivery. This shall give the buyer sufficient time to have time consuming tests, such as for germination, completed within this period.

2. Claims regarding genetic purity shall be made not later than within 180 days from the date of delivery. Fields or laboratory plantings used to determine purity shall not be destroyed before the Seller has been notified by telecommunication of any discrepancies and given reasonable time to inspect them.

3. Claims regarding trueness to variety for lots of certified seed shall give the Buyer the right to obtain, upon request, a copy of the official analysis, certifying the identify of the variety. This certificate shall be supplied by the Seller.

4. When variations occur in the tests of the Buyer and Seller, resulting in a dispute as to the quality of seed delivered, an official sampler, duly authorized by the respective State or Federal Department of Agriculture, shall draw a representative sample in accordance with the sampling procedures of the Association of Official Seed Analysts. This sample shall be divided into a sufficient number of parts and delivered as follows: one part each for information to the Buyer and the Seller, and one part for analysis to such official laboratory agreed upon the the [sic]

Seller and the Buyer. If the buyer and the Seller cannot agree on the laboratory, the Executive Vice President of ASTA or CSTA, upon request, shall designate a competent laboratory.

5. The laboratory to which the sample is mailed shall be instructed to submit, without delay, copies of its analysis to both the Seller and the Buyer.

6. The costs for sampling and the analysis shall be paid by the claimant, but reimbursed if the claimant obtains a decision in his favor.

RULE VII

REMEDIES TO QUALITY DEFICIENCIES

1. Rule V of these Rules described the numerous – but necessary – quality standards used in contract concluded for the buying and selling of seed for planting in North America. The diversity of state and federal laws and regulations, in addition to special quality requirement stated in a contract, make it impractical to formulate more detailed Rules pertaining to quality.

2. The following, however, shall apply as guidelines to settle quality deficiencies:

   a. The Buyer shall accept the seed where tolerances apply (as described in Rule V) as long as tolerances are not exceeded, as determined by a retest (see Rule VI, para. 4). The Seller shall not be responsible for payment of any price difference. If the quality exceeds the permitted tolerances or tolerances are excluded by contract, the Buyer shall have the right to refuse the seed.

   b. The Seller shall have the right to replace non-contractual seed as long as the replacement shall take place within the contractual shipping period. The

costs, including return freight, handling, etc., shall be borne by the Seller.

c. The Buyer and the Seller may agree that the Buyer attempts to recondition the seed at Seller's expense. The costs for reconditioning, however, cannot exceed the costs which would have occurred if the seed had been replaced by the Seller (including the loss of quantity due to reconditioning).

3. If no amicable settlement can be reached, the Buyer and the Seller shall have the right to submit the case for arbitration in accordance with Rule XVI of these Rules.

RULE VIII

CONTRACTS SUBJECT TO CROP AND MULTIPLICATION CONTRACTS

1. If a contract is concluded "subject to crop," the Seller shall report to the Buyer in the regular course of production all essential information regarding time of planting, conditions and inspections of fields, crop prospects, yields and qualities.

2. a. The Seller shall promptly inform the Buyer of any failure to deficiency in quantity and/or quality of the corresponding field and/or resulting seed crop.

   b. If the quality is below the contractual specifications, the Buyer shall retain the right to refuse the seed or accept it at a reduced price. If Seller and Buyer cannot agree amicably to a settlement, an arbitration (see Rule XVI) may be initiated to determine an equitable solution.

3. Multiplication Contracts. NORAMSEED Rules may also govern multiplication contract. Appropriate special conditions agreed to between the parties shall be incorporated in the contract.

RULE IX

SHIPPING TERMS

1. "F.O.B" carrier at named point of shipment – Under this term, the Buyer shall accept title to the goods at the named point and assume the costs and risks of transportation from the named point.

2. "Ex-warehouse," "ex-dock," "ex-wharf," etc., at named location – Under these terms, the Seller shall place the goods at the disposal of the Buyer at the agreed place, on the date or within the period specified, and the Buyer shall accept title to the goods at the named point and assume the costs and risks of the transportation from the named point.

3. "Delivered" at named point of destination – Under this term, the Seller shall assume the costs and risks of transportation to point of destination. Title passes to the Buyer at destination.

4. "Freight and duty paid" – Under this term, the Seller shall comply with all import regulations and shall assume the costs and risks of transportation, applicable duty and excise taxes, if any. The Seller shall assume the charges to clear the shipment through customs. Any changes in the import regulations, duty and taxes of the importing country after the date of contract which are not as yet officially announced at the date of the contract, shall be for the Buyer's account.

5. "Freight paid in bond" – Under this term, the Buyer shall pay the applicable duty, if any, and all charges to clear the shipment through customs. Apart from this, all provisions in Paragraph 4, above shall apply.

RULE X

SHIPPING PERIOD

1. The following periods for shipment shall be valid if the parties have not previously agreed to other specific conditions:

   a. "Instant shipment" means shipment within 24 hours;

   b. "Immediate shipment" means shipment within 3 days;

   c. "Prompt shipment" means shipment within 10 days;

   d. "Shipment before a fixed date" means shipment on any day before the fixed date;

   e. "Shipment within a specific time period" (such as August/September) means shipment on any day within this time period.

   f. "Shipment at Seller's option" means shipment on any day convenient to the Seller within a given time span, if any is indicated;

   g. "Shipment at Buyer's option" means shipment within a time span of not less than 10 days, to be indicated by the Buyer.

RULE XI

DEFAULTS OF SHIPPING INSTRUCTIONS

1. If the Buyer does not give shipping instructions in time, the Seller shall give the Buyer at any time, via telecommunication, a delay of two working days to receive proper instructions.

2. Should the instructions be forthcoming within these two working days, the Seller shall not be entitled to

any payment of damages, etc. However, should no instructions be received by the Seller within these two working days, the Seller shall have the right to cancel the contract and shall be entitled to payment of direct and indirect damages, such as interest, warehouse costs, price difference (loss of profit) etc. The Seller shall inform the Buyer of his decision by telecommunication.

3. Should the Seller accept shipping instructions after expiration of the contract period, payment of damages, if any, shall be agreed upon before shipment.

4. The provisions contained in Paragraphs 1., 2., and 3. of this Rule shall not apply where "instant" or "immediate" shipment (see Rule X) is agreed to, because shipping instructions shall have been expressed at the conclusion of the contract.

RULE XII

DEFAULTS OF SHIPMENT

1. If the Seller does not ship within the agreed time period, the Buyer shall, at any time, grant the Seller by telecommunication a delay of two working days to make shipment. No such delays apply to shipments as described under Rule X, 1.a. and 1.b.

2. Should shipment take place within the two days, the buyer shall not be entitled to any damages, etc. However, should no confirmation be received by the Buyer that the shipment was made within this delay, the Buyer shall have the right to cancel the contract and shall be entitled to payment of direct and indirect damages, such as interest, warehouse costs, price difference (loss of profit) etc. The Buyer shall inform the Seller of his decision by telecommunication.

3. If the contract specifies "without extra time limit" or "latest" or in similar terminology expresses that there is no extension implied, the Buyer shall have no obligation to grant an extra time limit.

RULE XIII

EXPIRATION OF A CONTRACT

If neither party has issued or received a request for shipment within 30 days of the last day of the permitted shipping period, the contract shall be considered lapsed without the buyer of the Seller being entitled to any damages.

RULE XIV

PAYMENT

1. Terms of payment shall be specified in the contract.

2. In all cases, payment shall be made in full and immediately when due. Every portion of a shipment shall be paid for separately, as soon as payment falls due.

3. The charges for collection of payment shall be for the Seller's account unless the Buyer does not pay in full and immediately when due, in which case they shall be for the Buyer's account.

4. a. If the Buyer does not pay within three working days of the due date of payment, or from the date on which he can legally do so, he shall pay the charges for collection, as well as interest at a rate of 5% per annum above the official bank rate in the Seller's country at the time the invoice was due for payment.

   b. This penalty of 5% is not due if the Buyer can prove that the delay in payment was due to circumstances over which he had no control.

5. It shall not be permissible to withhold payment to offset claims.

6. If the Buyer has not paid for the seed or not taken delivery upon arrival, or stated that he will not do so, he shall be liable for all damages, including expenses as well as loss of profit to the Seller.

7. If the circumstances indicate that the Buyer does not intend to pay or is unable to pay, the Seller shall have the right to seek collection of the outstanding debt through the intermediary of a court of law, without going to arbitration.

RULE XV

FORCE MAJEURE

1. The interpretation of "Force Majeure" as published by the International Chamber of Commerce at the date of contract shall be guiding (See Addendum 1)."

2. The party involving "Force Majeure" shall inform the other party as soon as pracitcal [sic] by telecommunication of the impossibility of delivery or the necessity of postponing delivery, indicating the reasons for the alleged Force Majeure.

RULE XVI

ARBITRATION

1. a. With the exception of the differences mentioned in Rule XIV, Paragraphs 6 and 7, all differences which cannot be amicably resolved, even if only one of the parties declare that there is a difference, arising from a contract started or concluded under these Rules, shall first be decided by arbitration before it can be submitted to a court of law.

b. Subject to any written clear and unambiguous agreement to the contrary, notice of the intention to arbitrate and application for arbitration shall be made in conformity with the provision of the Commercial Arbitration Rules of the American Arbitration Association (AAA – See Addendum 2).

2. Such applications for arbitration shall be made within 30 days either:

   a. from the occurrence of the event, or first possible recognition of the deficiency giving rise to the claim –

   or

   b. after the date of telecommunication or delivery of a registered letter attempting to enter into friendly negotiations – which remained without positive reply –

   or

   c. from the date of breaking-off of negotiations to settle the case amicably.

3. Extension of time for application – The parties may modify this period of time by mutual agreement. The AAA, for good cause, may extend a period of time established by its Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and its reason therefore.

4. According to the by-laws of ASTA, Article IV, (as amended April 14, 1989), and of CSTA, Article VIII (as amended November 14, 1989), oral hearings shall be waived and all disputes shall be submitted in accordance with the appropriate Section of the AAA Arbitration Rules.

5. The AAA Rules do not provide for an appeal. Therefore, the decision by an AAA Arbitration is final. However, it does not exclude the right of a party to

re-submit the case to a competent court of law after the decision has been rendered by the AAA.

ADDENDUM I

FORCE MAJEURE (EXEMPTION) CLAUSE:

Grounds of relief from liability:

1. A party is not liable for a failure to perform any of his obligations insofar as he proves:

   — that the failure was due to an impediment beyond his control; and

   — that he could not resonably [sic] be expected to have taken the impediment and its effects upon his ability to perform into account at the time of the conclusion of the contract; and

   — that he could not reasonably have avoided or overcome it or at least its effects.

2. Any impediment within paragraph 1., above may result from events such as the following, this enumeration not being exhaustive:

   a. war, whether declared or not, civil war, riots and revolutions, acts of piracy, acts of sabotage;

   b. natural disasters such as voilent [sic] storms, cyclones, earthquakes, tidal waves, floods, destruction by lightning;

   c. explosions, fires, destruction of machines, of factories and of any kind of installations;

   d. boycotts, strikes and lockouts of all kinds, slowdowns, occupation of factories and premises, and work stoppages which occur in the enterprise of the party seeking relief;

e. acts of authority, whether lawful or unlawful, apart from acts for which the party seeking relief has assumed the risk by virtue of other provisions of the contract; and apart from the matters mentioned in paragraph 3., below.

3. For the purposes of Paragraph 1., and unless otherwise provided in the contract, impediment does not include lack of authorization, of licenses, of entry or residence permits, or of approvals necessary for the performance of the contract and to be issued by a public authority of any kind whatsoever in the country of the party seeking relief.

Duty to notify:

4. A party seeking relief shall, as soon as practicable after the impediment and its effects upon his ability to perform become known to him, give notice to the other party of such impediment and its effect of his ability to perform. Notice shall also be given when the ground of relief ceases.

5. The ground of relief takes effect from the time of the impediment, or if notice is not timely given, from the time of notice. Failure to give notice makes the failing party liable in damages for loss which otherwise could have been avoided.

Effects of grounds of relief:

6. A ground of relief under this clause relieves the failing party from damages, penalties and other contractual sanctions, except from duty to pay interest on money owing as long as and to the extent that the ground subsists.

7. Further, it postpones the time for performance for such period as may be reasonable, thereby excluding

the other party's right, if any, to terminate or rescind the contract. In determining what is a reasonable period, regard shall be made to the failing party's receiving performance despite the delay. Pending resumption of performance by the filing party, the other party may suspend his own performance.

8. If the grounds of relief subsist for more than such period as the parties provide (the applicable period to be specified here by the parties), or in the absence of such provision for longer than a reasonable period, either party shall be entitled to terminate the contract with notice.

9. Each party may retain what he has received from the performance of the contract carried out prior to the termination. Each party must account to the other for any unjust enrichment resulting from such performance. The payment of the final balance shall be made without delay.

Supreme Court, U.S.
FILED
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No. 99-777

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

UNITED FARMERS PLANT FOOD, INC.,
D/B/A FARMERS AG CENTER,
Petitioner,

VS.

LEBANON CHEMICAL CORPORATION,
D/B/A LEBANON SEABOARD CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner United Farmers Plant Food, Inc., d/b/a Farmers Ag Center ("United"), and Respondent Lebanon Chemical Corporation, d/b/a Lebanon Seaboard Corporation ("Lebanon"), entered into Contract No. M-2020 on March 5, 1997. The item and quantity terms provided for the sale of 1,250,000 pounds of Kentucky 31 Tall Fescue. United generated the contract on a standard form that United used. At the bottom of the form was the following legend: "This memo is subject to the Trade Rules of the American Seed Trade Association." Rule XVI of the Trade Rules of the American Seed Trade Association ("ASTA") provided that "all differences which cannot be amicably resolved, even if only one of the parties declare [sic] that there is a difference, arising from a contract started or concluded under these Rules, shall first be decided by arbitration before it can be submitted to a court of law."

Contract No. M-2020 also contained the following under a section of the document entitled "Remarks":

4. The balance of seed left at Farmers Ag Center as of April 30th, 1997: bagged seed and/or seed of non shippable form.

5. The balance of seed left at Farmers Ag Center as of April 30th, 1997 will be billed out as follows: bagged seed from outside vendors: Farmers Ag Center's cost plus difference in cost and this contract according to quality of the seed. Non-shippable seed to be billed out at $.80 per pound—with the difference in $.80 and this contract being due August 1, 1997.

United argued that these "Remarks" required Lebanon to purchase the entirety of United's seed inventory on hand as of April 30, 1997, *in addition to* the 1,250,000 pounds provided for in the portion of the document entitled "Quantity." Lebanon, on

the other hand, maintained that Contract No. M-2020 unambiguously provided for the sale of 1,250,000 pounds of seed, and that Remarks numbers 4 and 5 dealt with shipment and payment terms with respect to the 1,250,000 pounds. United wanted payment in full for all 1,250,000 pounds of seed by the end of April 1997, even if some of the seed were not in shippable form at that time. Lebanon did not want to pay full price for seed that it could not immediately use. As a compromise, Lebanon agreed to pay the full price for seed that was shippable as of April 30, 1997, and to make a partial payment of $.80 per pound for any of the 1,250,000 pounds of seed that was not shippable as of April 30, 1997. Lebanon expected that United would process any of the remaining seed by August 1, 1997, at which time Lebanon would pay United the balance between the contract price and $.80.

Lebanon received 1,248,500 pounds of seed under Contract No. M-2020 before April 30, 1997. Lebanon paid in full for all of this seed and took delivery of it.

After Contract No. M-2020 was completed, Lebanon continued to receive orders from its customers for additional seed. These orders were evidenced by bills of lading that customers would send to Lebanon by computer. Lebanon, in turn, would forward these bills of lading to United's computer to fill. Because it was getting late in the selling season, Lebanon was apprehensive about entering into new seed contracts with United for fear of ending the season with a large, unsold inventory of seed.

Lebanon decided that it would attempt to fill customer orders out of its existing inventory on hand at United. If Lebanon did not have enough seed in inventory, or if the seed in Lebanon's inventory did not meet the packaging specifications of the customer, then United could go to market to buy just enough seed to meet the customer's bill of lading. It would be up to United to

determine whether Lebanon had enough seed in inventory to meet the orders. Lebanon communicated this change to United.

After March 5, 1997, United in fact had to go to market to purchase additional seed because Lebanon did not have sufficient inventory. United sent Lebanon a number of invoices for seed with bills of lading attached. Lebanon paid these invoices. Lebanon also paid several invoices that did not have bills of lading attached because the seed had been shipped directly to Lebanon's storage facility in Bristol, Illinois.

United also sent to Lebanon a number of invoices without bills of lading attached. These invoices, which used the same form as Contract No. M-2020, referenced contract numbers other than Contract No. M-2020. Just as with Contract No. M-2020, these additional invoices contained a legend stating that "this memo is subject to the Trade Rules of the American Seed Trade Association." Lebanon did not pay these invoices and asked United to furnish the bills of lading. The prices and the quality of seed reflected in these invoices did not comport with the price and quality provisions contained in Contract No. M-2020. United did not inform Lebanon until January 1998 that the additional invoices were supposedly related to Contract No. M-2020.

When United refused to deliver to Lebanon seed that Lebanon had paid for, Lebanon filed an action in the United States District Court for the Western District of Missouri (the Honorable Russell G. Clark, Senior United States District Judge) seeking specific performance and injunctive relief. The District Court ordered United to turn over the seed for which Lebanon had paid. United later counterclaimed for payment of the additional invoices allegedly generated under the auspices of Contract No. M-2020. United also moved to compel arbitration under Contract No. M-2020, or in the alternative, under the additional invoices.

On June 29 and 30, 1998, the District Court, sitting without a jury, conducted a two-day evidentiary hearing on United's motion to compel arbitration. The Court found that Contract No. M-2020 was unambiguous as to the quantity of seed sold pursuant to that contract, namely, 1,250,000 pounds, and that all of this seed had been paid for and delivered, thereby concluding the contract. The Court firmly rejected United's contention that the "Remarks" set forth in Contract No. M-2020 in any way suggested "that *additional* seed sales [were] contemplated under contract M-2020." Pet. for Writ of Cert. at 17a (*Lebanon Chemical Corp. v. United Farmers Plant Food, Inc.*, No. 98-3013-CV-S-RGC, Order (W.D.Mo. July 9, 1998)) (emphasis in original). In addition, the Court stated as follows:

> Even if contract M-2020 could be found to be ambiguous as United suggests, the Court finds from the evidence presented at the hearing on June 29, 1998, that the parties did not intend for contract M-2020 to be a standing contract for the sale of additional seed above the 1,250,000 pounds of seed that was bought and paid for under contract M-2020.

Id.

The District Court considered and rejected United's argument that the invoices United had sent to Lebanon created contracts for the sale of additional seed. While the parties had a prior course of business that established contracts based upon invoices, the Court found that the parties changed their method of making a contract.

> From the evidence presented at the hearing, the Court finds that the parties did not intend to consummate a contract until a bill of lading had been provided to Lebanon which showed to Lebanon that performance had been completed by United's delivery of seed to a customer of Lebanon. A bill of lading for inventory to be held at United did not

> necessarily constitute a completed contract until both parties agreed to the existence of that contract. With respect to the unpaid disputed seed that was held in inventory at United, the Court finds, therefore, that the parties did not intend to create contracts. Thus, no contracts were created for any of the unpaid disputed seed.

Id. at 18a.

Finding no contracts with respect to the disputed seed in question, the District Court denied United's motion to compel arbitration. On appeal, the Eighth Circuit affirmed, noting that the arbitration provision in the ASTA Trade Rules required arbitration only of those differences "arising from a contract started or concluded under these Rules . . . ." *Id.* at 7a (*Lebanon Chemical Corp. v. United Farmers Plant Food, Inc.*, 179 F.3d 1095 (8th Cir. 1999)). The appellate court "agree[d] with the district court that United has not established the existence of a contract from which the unpaid disputed invoices arise." *Id.* at 12a (*Lebanon Chemical Corp.*, 179 F.3d at 1102). "Without a contract from which the dispute arises, there can be no applicable arbitration clause." *Id.* at 11a (*Lebanon Chemical Corp.*, 179 F.3d at 1101).

ARGUMENT

It is axiomatic that before a court may compel parties to submit a dispute to arbitration, the court must first find that the parties had an agreement to arbitrate. "[T]he arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 1923 (1995). *See* 9 U.S.C. §3.

Far from usurping its proper role, the District Court in the present case properly exercised its gate keeping function under the applicable provision of the Federal Arbitration Act, 9 U.S.C. §3, by determining at the outset whether the parties had a written arbitration agreement governing the issues in dispute. The District Court conducted an evidentiary hearing and based upon the evidence, found that there was no contract and no arbitration agreement with respect the matters in dispute. In the absence of a contract and written arbitration agreement, the District Court properly held that no basis existed upon which the Court could compel arbitration.

Notably, United does not take issue with the District Court's findings of fact and conclusions of law. Instead, United faults the District Court for performing the very inquiry required of it under the Federal Arbitration Act. United erroneously contends that the mere existence of an arbitration agreement in *any* contract provides a sufficient basis to compel the parties to arbitrate, *even if the contract containing the arbitration agreement is completely unrelated to the subject matter of the dispute*. Such an argument defies common sense and ignores the requirement of 9 U.S.C. §3 that before compelling arbitration, a federal court must first be satisfied that an issue involved in a suit is referable to arbitration under a written agreement for such arbitration. The Eighth Circuit had little problem disposing of this argument:

> United argues that once the court found that M-2020 was a valid contract with an arbitration clause, its inquiry should have ended with all issues being sent to arbitration. We disagree. The arbitration agreement provides relief for disputes arising from a contract started under the ASTA rules. Finding a valid contract under the ASTA rules is only the first step of the district court's inquiry. The court must also make sure that the dispute arises from that contract. When a court determines arbitrability of a dispute, it looks to more than the mere existence of a valid arbitration agreement. It also measures the scope of that agreement and determines whether the present dispute is included within its reach.

Pet. for Writ of Cert. at 9a (*Lebanon Chemical Corp.*, 179 F.3d at 1100) (citing *First Options*, 514 U.S. at 944-45; *Houlihan v. Offerman & Co.*, 31 F.3d 692, 694-95 (8th Cir. 1994)).

Because Contract No. M-2020 was unrelated to the unpaid disputed seed, which was not subject to any contract, a written arbitration agreement did not exist with respect to the disputes concerning the unpaid seed. Therefore, the District Court properly denied United's motion to compel arbitration.

CONCLUSION

In response to United's motion to compel arbitration, the District Court correctly inquired into whether the parties had a written agreement to arbitrate the issues before the Court. The District Court conducted an evidentiary hearing and found that the parties did not have such an agreement. The appellate court agreed, and affirmed the District Court's order denying United's motion to compel arbitration. United does not dispute the District Court's findings of fact or conclusions of law, but rather faults the District Court for engaging in an inquiry to determine the existence *vel non* of an agreement to arbitrate. United's petition for a writ of certiorari is without merit and finds no support in the law or the facts.

Wherefore, Lebanon respectfully requests that the Court deny United's petition for a writ of certiorari.

Respectfully submitted,

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